Supreme Court, U.S.
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No. 98-___ 98-124

In The

Supreme Court of the United States

October Term, 1997

BURBANK-GLENDALE-PASADENA
AIRPORT AUTHORITY, A Joint Powers Agency,

Petitioner,

v.

CITY OF BURBANK,
A Municipal Corporation, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a political subdivision of a state may maintain an action under the Supremacy Clause of the United States Constitution to challenge state action that conflicts with federal law.

LISTING OF PARTIES

The parties to the proceedings below were petitioner Burbank-Glendale-Pasadena Airport Authority, a joint powers agency organized and existing pursuant to California law, and respondents the City of Burbank, a municipal corporation, the State of California, and James van Loben Sels in his official capacity as Director of the Department of Transportation of the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming dismissal of this action based on the district court's conclusion that Petitioner, because it is a political subdivision of the State of California, lacks standing to challenge a California statute in federal court.

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 136 F.3d 1360 (9th Cir. 1998).

The order of the District Court for the Central District of California dismissing this action (Appendix B, *infra*) is unreported.

The order of the Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing (Appendix C, *infra*) is unreported.

CONSTITUTIONAL PROVISIONS INVOLVED

The supremacy clause, United States Constitution, Article VI, clause 2, provides: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."

JURISDICTION

The decision of the court of appeals was entered on March 2, 1998. Petitioner sought a rehearing and suggested that the court rehear the appeal en banc. The petition for rehearing was denied on April 14, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the question whether a political subdivision of a state, faced with conflicting federal and state law, may seek from the courts a determination as to which law controls. In the Ninth Circuit, it may not. Political subdivisions – bound to follow federal law like all other entities – are thus prohibited from seeking judicial decisions on important preemption issues.

Petitioner Burbank-Glendale-Pasadena Airport Authority ("Airport Authority") is one such political subdivision. The Airport Authority owns and operates the Burbank-Glendale-Pasadena Airport ("Airport"). The Airport, a federally-funded commercial air transportation facility, serves more than five million passengers each year in intra- and inter-state commerce. Pursuant to federal law, the Airport Authority works hand in hand with the Federal Aviation Administration ("FAA") to ensure the safety of the users of the Airport and to secure the Airport's role in the national aviation system.

In their attempt to achieve these goals, the Airport Authority and the FAA have concluded that the Airport

must move its passenger terminal, built on its present site in 1930, to improve the safety of its runways and taxiways, which serve large, high-speed, modern commercial jet aircraft.[1] The City of Burbank ("Burbank"), aided by

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[1] As situated, the current terminal building fails to comply with important FAA safety criteria. These are:

(a) *The Building Restriction Line* ("BRL")

This structure setback requirement, established pursuant to FAA design standards published in FAA Advisory Circular 150/5300 and on the Airport's approved Airport Layout Plan, is designed to encompass the specific "protection zones" and "protection areas," as well as to retain clearances for navigation aid placement, instrument procedures and air traffic control tower lines of sight. For the Airport, the BRL is *750 feet* to each side of the centerline of each runway. The passenger terminal currently sits approximately *300 feet* from the centerline of the runways.

(b) *The Runway Object Free Area* ("OFA")

The *400 foot* OFA, also established by Advisory Circular 150/5300, is intended to preclude parked aircraft, structures and other objects from being located within 400 feet of runway centerlines. It is violated as to both runways by both the terminal building and aircraft parked at terminal gates.

(c) *The Obstacle Free Zone* ("OFZ") *Transitional Surface*

The OFZ is a clear zone covering all property within 200 feet of the runway centerlines (per Advisory Circular 150/5300). On instrument runways, it continues outward after the end of the runway at a 3:1 slope. The tails of aircraft parked at gates on the terminal's eastern concourse extend through this sloped surface.

(d) *Part 77 Primary and Transitional Surfaces*

Federal Aviation Regulations Part 77 establishes a variety of "clear zones," using imaginary surfaces extending over and beyond runways. These regulations are designed to protect the integrity of runway surfaces and adjacent air space. The Part 77 Primary Surface is a *500 foot* area on either side of runway

the State of California, seeks to delay, or to exert control over, the terminal relocation project to limit the noise it believes the relocation will cause. To that end, it has invoked California Public Utilities Code section 21661.6 ("Statute").[2]

This action challenges the constitutionality of the Statute and implementing procedures adopted by Burbank ("Procedures"). The Airport Authority contends that under the Court's decision in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and the Ninth Circuit decision in *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338 (9th Cir. 1992), the Statute and the Procedures are preempted by federal law, both

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centerlines that is to be kept free of any objects not required to be located within the area as a result of their function (such as navigational aids). The Transitional Surface is defined by a 7:1 slope beginning at the outer edge of the Primary Surface, and is intended to limit the height of objects as they approach the runway surfaces. The terminal and all parked aircraft violate both Part 77 surfaces on both runways.

[2] The Statute provides, in relevant part:

"(a) Prior to the acquisition of land by any political subdivision for the purposes of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.

(b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.

(c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.

(d) Upon approval of the plan, the proposed acquisition of the property may begin."

facially and as applied to the terminal relocation project. Individually and together the Statute and the Procedures represent an impermissible attempt by non-proprietor governmental entities both to delay and condition a project that enhances runway safety pursuant to federal safety regulations and to exercise control over airport noise.

The Airport Authority filed this lawsuit against Burbank to secure its right to move forward with its FAA approved terminal relocation project[3] without interference from Burbank.[4] Burbank filed counterclaims against the Airport Authority. James van Loben Sels in his official capacity as Director of the Department of Transportation of the State of California and the State of California were joined as defendants.[5]

On March 31, 1997, the district court, following the Ninth Circuit decision in *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980), dismissed the Airport Authority's action on the grounds that the Airport

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[3] On March 15, 1996, the FAA issued a Record of Decision approving the proposed terminal relocation project. Burbank's challenge to the FAA's conclusion was rejected by the Ninth Circuit. *City of Los Angeles v. Federal Aviation Administration*, 138 F.3d 806 (9th Cir. 1998).

[4] The Airport Authority contends that the district court had subject matter jurisdiction over its claims pursuant to 28 U.S.C. §§ 1331, 1343 and 2201(a).

[5] The State of California moved to intervene in the action as a defendant and therefore waived any protections afforded to the State by the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (a state can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it).

Authority, as a political subdivision of the State of California, lacks standing in federal court to challenge the constitutionality of the state Statute and Burbank's Procedures. On March 2, 1998, the Ninth Circuit, also relying on *South Lake Tahoe*, affirmed the district court's decision.

REASONS FOR GRANTING THE WRIT

THE JURISDICTIONAL QUESTION RAISED BY THIS CASE IS IMPORTANT AND HAS RECEIVED CONFLICTING ANSWERS IN THE COURTS OF APPEAL

The Supremacy Clause, U.S. Const., Art. VI, Cl. 2, invalidates any exercise of state power that unduly frustrates or obstructs the objectives of legitimate national policy. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).[6] It is beyond dispute that a political subdivision, like any other entity, can be profoundly affected by state action that conflicts with federal law. Indeed, in many instances, a political subdivision – like a school board charged with protecting the welfare of its students or an airport authority responsible for ensuring the safety of air travelers – may be the only entity sufficiently positioned to challenge such action. Consequently, if the Supremacy Clause's mandate that federal law "shall

[6] A plaintiff who seeks injunctive relief from state regulation on the ground that such regulation is preempted by a federal statute presents a federal question that the federal courts have jurisdiction to resolve. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (*citing Ex parte Young*, 209 U.S. 123, 160-62 (1908)).

be the supreme law of the Land" is to be achieved, the Supremacy Clause *must* be enforceable by political subdivisions of states as well as by individuals. If political subdivisions are prevented from challenging preempted state legislation and regulation, such legislation and regulation may go unchecked even though expressly prohibited by the Constitution.

In the present case, the lower court held that a political subdivision of a state lacks standing to challenge the validity of state action under any provision of the United States Constitution, including the Supremacy Clause. Although the lower court treated the issue as a standing issue, the Ninth Circuit in fact holds that a political subdivision has no substantive constitutional rights to assert against its state. *See South Lake Tahoe*, 625 F.2d at 232. The Circuit's decision was based on a line of cases holding that a municipal corporation, created by a state for the better ordering of government, has *no* privileges and immunities under the Federal Constitution which it may invoke in opposition to the will of its creator. *See Williams v. Baltimore*, 289 U.S. 36 (1933); *Trenton v. New Jersey*, 262 U.S. 182 (1923); *Williamson v. New Jersey*, 130 U.S. 189 (1889). This rule has been followed in both federal and state courts to prohibit political subdivisions from mounting constitutional challenges to state action in *any* forum.

The Ninth Circuit's decision prohibiting the Airport Authority from challenging a preempted state statute, however, conflicts with decisions of the Court that permit political subdivisions to assert constitutional challenges to state action. Moreover, the lower court's decision creates a conflict among the Circuits on the question

whether a political subdivision – even if unable to challenge state action under the Fourteenth Amendment – may maintain a constitutional challenge to state action under the Supremacy Clause. It is time for the Court to consider and resolve this important jurisdictional issue.

A. The Court's Precedent Leaves Critical Issues Unresolved and the Question Presented Should Be Decided Now

During the last thirty years, the Court has repeatedly considered – without expressly addressing – a political subdivision's right to assert constitutional claims against its state. Uniformly, the Court has permitted such challenges to proceed. In *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court permitted a local board of education to challenge under the Establishment and Free Exercise Clauses of the First Amendment a New York statute requiring local public schools to lend textbooks free of charge to students in public and private schools. In *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982), the Court permitted three Washington school districts to sue their State under the Fourteenth Amendment to enjoin the enforcement of a statewide voter initiative that shifted control over school busing plans from the local to the state level.[7] And, in *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), the Court permitted Lawrence County, a political subdivision of the State of South

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[7] On the merits, the Court ruled that the challenged state law was unconstitutional and that the Seattle School District was entitled to attorney's fees as the prevailing party in the litigation. *Seattle School District*, 458 U.S. at 487 n.31.

Dakota, to challenge a South Dakota statute governing the distribution of school funding on the grounds that the statute conflicted with federal law specifying how certain funds should be disbursed.

Although *Brown*, *Seattle School District* and *Lead-Deadwood* appear to foreclose any argument that a political subdivision may not wage a constitutional challenge to state law, the lower courts have been unwilling to read these cases so broadly. This is so because the rule prohibiting a political subdivision from asserting a constitutional challenge to state action also emanates from the Court. The line of cases (commonly referred to as the *Hunter* or *Trenton* line of cases) begins with *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which Chief Justice Marshall articulated the view that in many respects states had the right to exercise unfettered control over their political subdivisions. *Hunter v. Pittsburgh*, 207 U.S. 161 (1908), adopted a similar view, declaring that municipal corporations, as political subdivisions of the state, are largely subject to their creator's will and thus without federal constitutional protection in many respects. In *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923), the Court stated that "[t]he power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned." And, in *Williams v. Baltimore*, 289 U.S. 36, 40 (1933), the Court stated that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

While permitting political subdivisions to assert constitutional rights against their states, *Brown*, *Seattle School District* and *Lead-Deadwood* did not analyze – much less expressly overrule – the *Hunter* line of cases.[8] Consequently, the lower courts have been unable to reject these cases. *See, e.g., New York v. Richardson*, 473 F.2d 923 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973); *Amato v. Wilentz*, 952 F.2d 742 (3d Cir. 1991); *City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385 (4th Cir.), *cert. denied*, 516 U.S. 974 (1995); *Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984); *South Macomb Disposal Auth. v. Washington*, 790 F.2d 500 (6th Cir. 1986); *Arlington Heights v. Regional Transp. Auth.*, 653 F.2d 1149 (7th Cir. 1981); *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980); *Housing Auth. of Kaw Tribe of Indians of Oklahoma v. Ponca City*, 952 F.2d 1183 (10th Cir. 1991), *cert. denied*, 504 U.S. 912 (1992); *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986); *cert. denied*, 479 U.S. 1085 (1987). State courts, too, have applied the *Hunter* rule to prohibit political subdivisions from asserting constitutional rights against their states. *See, e.g., Kenai Peninsula Borough v. Department of Community & Regional Affairs*, 751 P.2d 14 (Alaska 1988); *Star-Kist Foods, Inc. v. County of Los Angeles*, 719 P.2d 987 (Cal. 1986), *cert. denied*, 480 U.S. 930 (1987); *Evanston v. Regional Transp. Auth.*, 559 N.E.2d 899 (Ill. App. 1990).

Until the Court definitely and expressly overrules the *Hunter* line of cases, the lower courts will continue to

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[8] Indeed, the *Lead-Deadwood* Court reached its conclusion despite the dissenters' contention that *Hunter* forbade such a result. 469 U.S. at 270-71 (Rehnquist, J., dissenting).

follow the rule set forth in those cases and prohibit political subdivisions from challenging state action under the United States Constitution.[9] If so, actions such as those reviewed by the Court in *Brown*, *Seattle School District* and *Lead-Deadwood*, may go unchecked.

B. The Lower Courts Apply The Court's Precedent In An Inconsistent Manner

Even if the Court concludes that *Brown*, *Seattle School District* and *Lead-Deadwood* did not overrule the *Hunter* line of cases, review of the Ninth Circuit's absolute prohibition against constitutional challenges to state action is necessary to ensure uniform application of the *Hunter* rule in the federal courts. While each Circuit that has addressed the issue of the continued viability of *Hunter*'s rule has concluded that the rule indeed persists, the Circuits have applied this rule in an inconsistent manner.

As noted above, the Ninth Circuit holds that a political subdivision of a state may not assert *any* constitutional challenges against its state, including challenges under the Supremacy Clause. The Fourth and Fifth Circuits have reached the opposite conclusion and permit political subdivisions to challenge state action under the Supremacy Clause. *See Rogers v. Brockette*, 588 F.2d 1057

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[9] Justices White and Marshall recognized the inconsistency between the *Hunter* line of cases and *Brown* when they dissented from the Court's decision to deny certiorari in the *South Lake Tahoe* case. 449 U.S. 1039, 1041-42 (1980) (White, J., dissenting).

(5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *School Board v. Baliles*, 829 F.2d 1308 (4th Cir. 1987).[10]

The Sixth and Eleventh Circuits, and the California Supreme Court, have recognized that the *Hunter* rule does not prohibit *all* constitutional challenges to state statutes by political subdivisions. *See South Macomb Disposal Auth.*, 790 F.2d at 504 (recognizing Supremacy Clause exception); *Alabama*, 791 F.2d at 1454 (rejecting contention that political subdivision has no federally protected rights); *Star-Kist*, 719 P.2d at 992 (recognizing Commerce Clause exception). The Third Circuit has recognized that support for the *Hunter* rule is waning. *Amato*, 952 F.2d at 755 ("Judicial support for this rule may be waning with time."). The First, Second, Seventh,

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[10] The *Rogers* court held that a school district may assert a Supremacy Clause challenge to a state law that required a district with a substantial number of low income students to participate in a federally subsidized school breakfast program. In resolving the standing question, the *Rogers* court studied the historic basis of the "no standing" rule and concluded that the rule has generally been applied in two types of cases: those in which the state has altered political subdivisions' boundaries and those involving state modification of a benefit previously granted to a subdivision. The court stated that "these cases are substantive interpretations of the constitutional provisions involved" and thus simply "adhere to the substantive principle that the Constitution does not interfere with a state's internal political organization." 588 F.2d at 1068, 1070. The court concluded that because no comparable limit on Congress' power to "interfere" in a state's internal political organization exists, a subdivision of the state may raise a claim that state law conflicts with federal law and is therefore void. *Id.* at 1070-71.

Eighth and Tenth Circuits have not expressly addressed this issue.[11]

The Ninth Circuit therefore stands alone in its holding that the *Hunter* rule bars Supremacy Clause challenges by political subdivisions.[12] This conflict and the expressed confusion of the courts make clear that the lower courts need guidance on this very important jurisdictional question and that such guidance can only come from the Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[11] In *Branson Sch. Dist. Re-82 v. Romer*, 958 F. Supp. 1501, 1507-08 (D. Colo. 1997), the district court, lacking guidance from the Tenth Circuit, rejected the Ninth Circuit's *South Lake Tahoe* analysis and adopted the Fifth Circuit's "Supremacy Clause exception."

[12] Without addressing the *Hunter* rule, many lower courts have permitted political subdivisions to maintain Supremacy Clause challenges to state action. *See, e.g., Burbank-Glendale-Pasadena Airport Authority v. Los Angeles*, 979 F.2d 1338 (9th Cir. 1992); *Triplett v. Tiemann*, 302 F. Supp. 1239 (D. Neb. 1969); *Carlsbad Union Sch. Dist. v. Rafferty*, 300 F. Supp. 434 (S.D. Cal. 1969); *Douglas Indep. Sch. Dist. No. 3 v. Jorgenson*, 293 F. Supp. 849 (D.S.D. 1968); *Hergenreter v. Hayden*, 295 F. Supp. 251 (D. Kan. 1968).

APPENDIX A

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, a joint powers agency, Plaintiff-Appellant, v. CITY OF BURBANK, a municipal corporation; JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California, Defendants-Appellees, and STATE OF CALIFORNIA, Intervenor-Defendant-Appellee.

No. 97-55520

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

136 F.3d 1360; 1998 U.S. App. LEXIS 3242; 98 Cal. Daily Op. Service 1440; 98 Daily Journal DAR 1996

December 1, 1997, Argued, Submitted,
Pasadena, California

March 2, 1998, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-96-04125-LGB. Lourdes G. Baird, District Judge, Presiding.

DISPOSITION: Motion for judicial notice GRANTED. Judgment of the district court AFFIRMED.

COUNSEL: Jennifer L. Spaziano, Los Angeles, California, for the plaintiff-appellant.

Dana C. Nifosi, Washington, D.C., for the defendants-appellees.

Dennis A. Barlow, City Attorney, City of Burbank, Burbank, California, for the defendants-appellees.

Perry M. Rosen, Cutler & Stanfield, Washington, D.C., for the defendants-appellees.

Susan L. Durbin, Deputy Attorney General for the State of California, Los Angeles, California, for the intervenor-defendant-appellee.

JUDGES: Before: Mary M. Schroeder and Alex Kozinski, Circuit Judges, and Ronald M. Whyte,* District Judge. Opinion by Judge Schroeder; Concurrence by Judge Kozinski.

OPINION BY: MARY M. SCHROEDER

OPINION: OPINION

SCHROEDER, Circuit Judge:

The Burbank-Glendale-Pasadena Airport Authority ("Authority") is engaged in a substantial expansion of terminal and parking facilities for the Burbank Airport. The City of Burbank ("Burbank") is reviewing the acquisition of land for that expansion, pursuant to California Public Utilities Code § 21661.6. The Authority filed this action to block Burbank's review, claiming that Burbank's implementation of the state statute in this case is contrary to federal law, and hence unconstitutional under the Supremacy Clause, as well as other clauses of the United States Constitution.

The problem for the Authority is that it is a political subdivision of the State of California. The district court dismissed the action on the ground that it is barred under our court's decision in *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), which held that a political subdivision of a state lacks

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* Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

standing under federal law to challenge the constitutionality of a state statute. The Authority appeals, contending the Supreme Court has overruled *South Lake Tahoe* or, in the alternative, that we should recognize an exception to the *South Lake Tahoe* holding. We hold that the Authority's efforts to circumnavigate *South Lake Tahoe*'s broad, per se rule are ultimately unavailing and affirm the district court.

BACKGROUND

The Authority is a "Joint Powers Agency" created by the cities of Burbank, Glendale, and Pasadena pursuant to Cal. Gov't Code § 6500. The Authority is the sole proprietor and operator of the Airport. The Authority wants to acquire approximately 130 acres of property located within Burbank, commonly referred to as the B-6 property, from the Lockheed Martin Corporation for the purpose of constructing a new passenger terminal at the Airport.

In April 1996, pursuant to authority granted by Cal. Pub. Util. Code § 21661.6, Burbank adopted "Procedures for Review by the Burbank City Council of Plan for Expansion of the Burbank-Glendale-Pasadena Airport" ("Review Procedures"). The Review Procedures provide that the Authority's proposed acquisition of the property for the new terminal may not begin until: (1) the Authority submits a plan detailing the proposed uses of the property to the Burbank City Council; (2) the Burbank City Council holds a public hearing on the plan; and (3) the Burbank City Council approves the plan.

In June 1996, the Authority filed this action in federal court against Burbank, seeking to have the statute and the Review Procedures declared unconstitutional, and to have their future enforcement enjoined. The Authority alleged that the statute and the Review Procedures: (1) violated the Supremacy Clause by regulating air safety, an area reserved for federal regulation; (2) violated the Commerce Clause by unduly interfering with or burdening interstate commerce; and (3) violated the Due Process Clause of the Fourteenth Amendment by being impermissibly vague. The Authority further alleged that even if the statute and the Review Procedures are facially valid, Burbank should be prevented from requiring compliance pursuant to the equitable doctrines of waiver and estoppel.

In September 1996, the Authority filed its First Amended Complaint, adding the California Department of Transportation as a party defendant. The Burbank City Council in October 1996 adopted a recommendation of its staff and disapproved of the Authority's expansion of the Airport as proposed, including the plan to acquire the B-6 property.

In April 1997, the district court, relying on *South Lake Tahoe*, entered an order dismissing the Authority's action for lack of standing because the Authority is a political subdivision of the State of California and cannot challenge the constitutionality of the statute and the Review Procedures in federal court. The Authority appeals.

DISCUSSION

The issues raised by the Authority are all issues of law and all relate to whether this court should follow *South Lake Tahoe* in this case.

The Authority's primary contention is that *South Lake Tahoe* and the principles upon which it relied were impliedly overruled by the United States Supreme Court's decision in *Washington v. Seattle School District*, 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982). A divided panel of this court previously rejected this argument in *Indian Oasis-Baboquivari v. Kirk*, 91 F.3d 1240, 1243-44 (9th Cir. 1996) (*"Indian Oasis I "*), *reh'g en banc granted*, 102 F.3d 999 (9th Cir. 1996), *appeal dismissed*, 109 F.3d 634 (9th Cir. 1997) (en banc).

Although *Indian Oasis I* has no precedential value, the arguments on both sides of the issue were thoroughly explored in the panel's opinions. Both the majority and minority discussed the Supreme Court decision in *Seattle School District*. That case concerned a school district's challenge to the constitutionality of a statewide voter initiative concerning school bussing. The Supreme Court upheld the school district's contention that the initiative violated equal protection. Despite the starkness of the Supreme Court's holding on the merits, the Court did not expressly address the question of standing, and thus did not directly consider whether the school district, unquestionably a political subdivision of the state, had standing to bring the action in the first place. We must conclude, as did the majority in *Indian Oasis I*, that *Seattle School District* does not constitute binding authority with respect to

standing. *See United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 97 L. Ed. 54, 73 S. Ct. 67 (1952).

In *Tucker Truck*, the Supreme Court discussed the effect of an opinion where the merits were decided, but jurisdiction was not raised or addressed, on the determination of whether jurisdiction exists when raised in a later case. The *Tucker Truck* court stated:

> The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not binding precedent on this point. Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.

Id., 344 U.S. at 38, 73 S. Ct. at 69.

Relying on *Tucker Truck*, the panel majority in *Indian Oasis I* held that it was bound to follow *South Lake Tahoe*. It stated:

> Given the fact that we have explicit precedent on the point of political subdivision standing, and that the Supreme Court has never directly considered the issue, we cannot say that the weight of its implicit exercise of jurisdiction is sufficiently powerful to undermine the law by which we are bound. We therefore remain obliged to follow *South Lake Tahoe*.

Indian Oasis I, 91 F.3d at 1244.

This court has followed the rationale of *Tucker Truck* in other decisions. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985); *Sethy v. Alameda*

County Water Dist., 545 F.2d 1157, 1159-60 (9th Cir. 1976) (en banc); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 n.4, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989) ("[T]his Court has never considered itself bound [by prior sub silentio holdings] when a subsequent case finally brings the jurisdictional issue before us.") (citation and internal quotation marks omitted); *Webster v. Fall*, 266 U.S. 507, 510, 69 L. Ed. 411, 45 S. Ct. 148 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents."). We find nothing in decisions of the Supreme Court or of this court to question the soundness of those rulings. Accordingly, we hold that *South Lake Tahoe* was not overruled by *Seattle School District*.

The Authority alternatively contends that even if *South Lake Tahoe* is still good law, we should recognize an exception to its holding for claims based on the Supremacy Clause. Several federal courts have apparently stated that, even though there is a general rule against standing on the part of a state subdivision to contest state statutes, standing may nevertheless exist where the state law is interfering with strong federal interests. *See Rogers v. Brockette*, 588 F.2d 1057, 1070-71 (5th Cir. 1979) (permitting Supremacy Clause challenges); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 504 (6th Cir. 1986) (suggesting that political subdivisions have standing to sue in some circumstances); *United States v. State of Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986) (holding that no per se rule applies); *see also Amato v. Wilentz*, 952 F.2d 742, 754-55 (3d Cir. 1991) (third party standing case that notes general rule as current law, but

acknowledges that support for it may be waning); *City of Charleston v. Public Serv. Comm. of West Virginia*, 57 F.3d 385, 389-90 (4th Cir. 1995) (stating that there is some support for the general rule, but that it has been applied mostly in Fourteenth Amendment cases, and that its expansiveness is in doubt).

This court, however, has not recognized any exception to the per se rule, and the broad language of *South Lake Tahoe* appears to foreclose the possibility of our doing so. *See South Lake Tahoe*, 625 F.2d at 233 ("political subdivisions" of a state lack standing to challenge statutes of the state itself, or one of its political subdivisions, on "constitutional grounds"). Indeed, the complaint in *South Lake Tahoe* included a Supremacy Clause claim, as well as violations of the Fifth and Fourteenth Amendments. *See id.* at 233. Accordingly, we must reject the contention that we should create such an exception at this point.

Finally, the Authority contends that because Burbank is a charter city, rather than a general law city, it is not a political subdivision of the state for purposes of its ability to challenge a state statute. The Authority relies upon Supreme Court holdings that subdivisions of the state are creations of state law and have the authority conferred upon them by state law. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 177, 52 L. Ed. 151, 28 S. Ct. 40 (1907). *See also City of Trenton v. New Jersey*, 262 U.S. 182, 187, 67 L. Ed. 937, 43 S. Ct. 534 (1923) ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit."); *United Building and Construction Trades Council of Camden*

County v. City of Camden, 465 U.S. 208, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984).

We do not believe these cases are dispositive of the federal standing issue before us. None were brought by a governmental or quasi-governmental entity. Moreover, charter cities in California generally are defined as political subdivisions along with other governmental entities. *See, e.g.*, Cal. Pub. Util. Code § 21010 (State Aeronautics Act governing airport operations in California, which defines a political subdivision as "any county, city, city and county, public corporation district or other political entity or public operation of the state"). *See also* Cal. Pub. Util. Code § 21690.6 ("The provisions of this article shall apply to any airport owned or operated by a political subdivision, including a charter city.").

We must deal with one further administrative matter. The City of Burbank has moved this court to take judicial notice of pleadings filed in a related state court action, *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, No. EC022341 (Superior Court of the State of California). This state case was filed by Burbank after the district court entered its order of dismissal. The parties at argument informed this court that the state court action is proceeding pursuant to California state law, which permits challenges of political subdivisions to the constitutionality of state enactments under certain circumstances. *See Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 719 P.2d 987, 992, 227 Cal. Rptr. 391 (Cal. 1986). The motion for judicial notice is GRANTED.

The judgment of the district court is AFFIRMED.

CONCUR BY: ALEX KOZINSKI

CONCUR: KOZINSKI, Circuit Judge, concurring.

I join Judge Schroeder's opinion but write briefly to address appellant's suggestion that we reconsider *South Lake Tahoe,* at least insofar as it denies state instrumentalities standing to raise constitutional claims based on the Supremacy Clause. While we are bound by the law of the circuit, the fact that three other circuits seem to have recognized an exception to the per se rule of *South Lake Tahoe, see maj. op.* at 1681, might be a reason to reconsider the matter en banc. *See, e.g., United States v. Jose,* 131 F.3d 1325, 1997 WL 778255 (9th Cir. 1997) (en banc).

Unfortunately, the cases from the other circuits do not merit emulation. Supremacy Clause claims do differ from other constitutional claims in this respect: Most constitutional claims pit the individual against the power of the government, while Supremacy Clause claims protect the interests of the federal government against encroachment by the states. Appellants argue that even if state instrumentalities do not have personal rights, like those protected by the Bill of Rights, they are surely able to promote federal interests by litigating federal preemption claims against the state.

I am not so sure. A federal preemption claim, after all, asserts the supremacy of federal law over state law. Congress is free to exercise its powers under the Supremacy Clause, but can it conscript state instrumentalities to aid in destruction of the state's laws? Suppose Congress passes a statute and empowers the state's Attorney General to bring suit to set aside any state law inconsistent

therewith. Since the Attorney General's responsibility is to enforce the laws of the state, is it consistent with his duties to task him with having some of those laws set aside? Or, what if Congress bestows that power on a member of the Governor's cabinet, such as the Secretary of Transportation? Can Congress drive a wedge between the Governor and a member of his cabinet by giving that official federal powers that conflict with his responsibilities as the Governor's political appointee? There is a plausible argument that Congress may not interfere with the functioning of state officials and instrumentalities by endowing them with powers and duties that conflict with their responsibilities under state law. *Cf. Printz v. United States*, 138 L. Ed. 2d 914, 117 S. Ct. 2365, 2381 (1997) ("It is no more compatible with this independence and autonomy that [States'] officers be 'dragooned' (as Judge Fernandez put it in his dissent below) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.") (citation omitted).

How far such a limitation extends – if it exists at all – is something that bears thinking about. None of the circuits that have rejected *South Lake Tahoe* have considered the question, and neither have the parties before us. The issue deserves exploration before we carve out a Supremacy Clause exception to *South Lake Tahoe*. I am therefore content to await such reconsideration if and when a case arises where the question is given appropriate attention.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, a Joint Powers Agency, Plaintiff, v. CITY OF BURBANK, a municipal Corporation; JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of Transportation of the State of California, Defendants, STATE OF CALIFORNIA, Intervenor-Defendant, AND RELATED COUNTERCLAIMS.	CV 96-4125 LGB (SHx) ORDER DISMISSING CASE

(Filed March 31, 1997)

I. INTRODUCTION

The three cross-motions for summary judgment of (1) Plaintiff Burbank-Glendale-Pasadena Airport Authority ("the Authority"); (2) defendant City of Burbank ("Burbank"); and (3) defendant James van Loben Sels, Director

of the California Department of Transportation ("DOT"),[1] and intervenor-defendant the State of California (the "State") (collectively the "State Defendants"), as well as Burbank's Motion for Leave to File Declaration of Richard W. Danforth, came on regularly for hearing on March 31, 1997.

In their summary judgment motions, Burbank and the State Defendants have raised the issue of the Authority's standing to bring this action. Accordingly, the Court hereby CONSTRUES the portions of Burbank's Motion for Summary Judgment and the State Defendants' Motion for Summary Judgment that address the Authority's standing to sue as Motions to Dismiss under Federal Rule of Civil Procedure ("Rule") 12(h) (3). Having reviewed all pertinent papers on file and considered the oral argument of counsel, the Court concludes that the Authority lacks standing to bring the instant action. Accordingly, the Court GRANTS the Motions to Dismiss and DISMISSES this case. The Court also finds that the remaining motions are MOOT.

II. BACKGROUND

This action arises out of a dispute between the Authority and Burbank over a planned expansion of the Burbank-Glendale-Pasadena Airport ("the Airport") and the proposed acquisition of certain land in Burbank for that expansion.

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[1] Because van Loben Sels is sued in his official capacity the Court will hereinafter refer to DOT in his place.

The following facts are undisputed, except as otherwise noted.[2] The Court here sets out only those facts pertinent to the issue of the Authority's standing to sue.

The Authority is a "Joint Powers Agency" created by the cities of Burbank, Glendale, and Pasadena pursuant to California Government Code sections 6500 *et seq.* (Burbank's Genuine Issues ¶ 1.) The Authority is the sole proprietor and operator of the Airport. (*Id.* ¶ 2.) The Authority proposes to acquire approximately 130 acres of property located within Burbank, commonly referred to as the B-6 property, from the Lockheed Martin Corporation ("Lockheed Martin") for the purpose of constructing a new passenger terminal at the Airport. (Authority's Genuine Issues ¶ 3.)

Burbank is a municipal corporation of the State of California. (Authority's Genuine Issues ¶ 2.) Burbank contends that, pursuant to California Public Utilities

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[2] This factual summary draws on the following: (1) the Authority's Statement of Uncontroverted Material Facts and Conclusions of Law ("Authority's Uncontroverted Facts"); (2) Burbank's Statement of Genuine Issues of Material Fact ("Burbank's Genuine Issues"), in which the State Defendants join, in response; (3) Burbank's Statement of Uncontroverted Material Facts and Conclusions of Law ("Burbank's Uncontroverted Facts"), in which the State Defendants join; and (4) the Authority's Statement of Genuine Issues of Material Fact ("Authority's Genuine Issues") in response.

Code section 21661.6 ("the Statute"),[3] the Authority must obtain approval from Burbank before acquiring the B-6 property. (Burbank's Genuine Issues ¶ 17.)[4]

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[3] The Statute, which is entitled "Submission of plan for expansion or enlargement of airport," provides that

> (a) Prior to the acquisition of land by any political subdivision for the purpose of expanding or enlarging an existing publicly owned airport, the acquiring entity shall submit a plan of such expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.
>
> (b) The plan shall show in detail the airport-related uses and other uses proposed for the property to be acquired.
>
> (c) The board of supervisors or the city council, as the case may be, shall, upon notice, conduct a public hearing on such plan, and shall thereafter approve or disapprove the plan.
>
> (d) Upon approval of the plan, the proposed acquisition of property may begin.
>
> (e) The use of property so acquired shall thereafter conform to the approved plan, and any such variance from such plan, or changes proposed therein, shall first be approved by the appropriate board of supervisors or city council after a public hearing on the subject of the variance or plan change.
>
> (f) The requirements of this section are in addition to any other requirements of law relating to construction or expansion of airports.

Cal. Pub. Util. Code § 21661.6 (West 1994).

[4] It is undisputed that Burbank *contends* this. It is very much in dispute, however, whether the Authority is actually required to obtain such approval.

In April 1996, pursuant to the authority granted by the Statute, Burbank adopted "Procedures for Review by the Burbank City Council of Plan for Expansion of the Burbank-Glendale-Pasadena Airport" ("the Review Procedures"). (Burbank's Genuine Issues ¶ 18.) Burbank's Review Procedures provide that the Authority's proposed acquisition of the property for the new terminal, which includes the B-6 property, may not begin until: (1) the Authority submits a plan detailing the proposed uses of the property to Burbank; (2) Burbank holds a public hearing on the plan; and (3) Burbank subsequently approves the plan. (Authority's Smith Decl. Ex. 3 (the Review Procedures) at 6.)[5]

On June 11, 1996, the Authority filed its initial Complaint against Burbank, seeking to have the Statute and the Review Procedures declared unconstitutional and to have their future enforcement enjoined. The Authority

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[5] The Review Procedures provide for approval by the Burbank City Council of the expansion plan if the City Council finds that:

> (1) The advantages to the public of the proposed expansion outweigh the disadvantages to both the public and the environment. Environmental factors to be considered include noise, air pollution, and the burden on surrounding areas, including traffic.
>
> (2) Approval of the Expansion Plan is consistent with the objective of adopting land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses.

(*Id.* at 13.)

alleged that the Statute and the Review Procedures (1) violate the Supremacy Clause, U.S. Const. art. VI, cl. 2, by purporting to regulate in the area of air safety, a matter reserved for federal regulation; (2) violate the Commerce Clause, U.S. Const. art. I, § 8, by unduly interfering with or burdening interstate commerce; and (3) violate the Authority's right to Due Process as guaranteed by the Fourteenth Amendment, because the Statute and the Review Procedures are unconstitutionally vague. The Authority further alleged that even if the Statute and the Review Procedures are facially valid, Burbank should be prevented from requiring compliance therewith by the equitable doctrines of waiver and estoppel.

On August 7, 1996, the Authority commenced an action against Lockheed Martin in Los Angeles County Superior Court to condemn the B-6 property ("the Condemnation Action"), *Burbank-Glendale-Pasadena Airport Auth. v. Lockheed Corp. et al.*, LASC Case No. BC 155222. (*See* Szczepkowski Decl. Supp. Counterclaim Def. Lockheed Martin's Req. Jud. Not. ¶ 2 & Ex. A (copy of the Complaint in that action).)

On September 16, 1996, Judge Wardlaw, in whose court this case was originally filed, granted Plaintiff's motion for leave to file an amended complaint, and granted the State leave to intervene. On September 17, 1996, Plaintiff filed its First Amended Complaint, adding DOT as a party defendant.

On September 30, 1996, Burbank answered the First Amended Complaint and counterclaimed against the Authority and Lockheed Martin. By its counterclaims, Burbank seeks, in essence, to enjoin the Authority from

acquiring land within Burbank without the approval of the Burbank City Council, and to enjoin the Authority and Lockheed Martin from transferring the B-6 property without similar approval. Burbank also seeks declaratory judgments that the Authority must obtain the Burbank City Council's approval prior to acquiring an interest in land in Burbank, and that the Authority and the FAA are on notice of Burbank's objection to any expansion of the Airport within Burbank.

On October 3, 1996, the State answered on behalf of DOT.

On October 15, 1996, pursuant to the Statute and the Procedures, the Burbank City Council adopted the recommendation of its Staff and disapproved the Authority's terminal project as proposed, including the plan to acquire the B-6 property. (Burbank's Genuine Issues ¶ 20 & Authority's Genuine Issues ¶ 29.)

On November 12, 1996, Lockheed Martin moved to dismiss Burbank's counterclaims as against Lockheed Martin.

The case was transferred from Judge Wardlaw to this Court on November 21, 1996.

On November 26, 1996, the Authority answered Burbank's counterclaims.

By Order entered January 16, 1997, this Court granted Lockheed Martin's Motion to Dismiss the counterclaims.

The Authority has stated that on March 6, 1997, in the Condemnation Action, the Los Angeles Superior Court

granted the Authority's Motion for An Order of Possession. (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 1-2.) Pursuant to that order, the Authority alleges, the Authority is entitled to take possession of the B-6 property on or about June 3, 1997. (*Id.* at 2.)

III. THE AUTHORITY'S STANDING

Burbank and the State Defendants have raise [sic] the threshold issue of whether the Authority has standing to bring this action. They contend that the Authority is a political subdivision of the State of California and therefore lacks standing to challenge a statute enacted by the State or an ordinance enacted by another political subdivision of the State in federal court on the ground that the statute or ordinance violates any provision of the federal constitution, including the Supremacy Clause. (Burbank's Mem. Supp. Mot. Summ. J. at 9, 15-17; State Defendants' Mem. Supp. Mot. Summ. J. at 8-9.)

A. LEGAL STANDARDS

Standing is a necessary element of federal court jurisdiction. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). "A threshold question in every federal case is, therefore, whether at least one plaintiff has standing." *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency,* 625 F.2d 231, 233 (9th Cir.), *cert. denied,* 449 U.S. 1039 (1980). The plaintiff's lack of standing cannot be waived by the parties, and must be examined by the court. *United States v. Hays,* ___ U.S. ___, 115 S. Ct. 2431, 2435 (1995).

In *South Lake Tahoe*, the City of South Lake Tahoe and its mayor and members of its city council brought a federal action against the California Tahoe Regional Planning Agency (the "CTRPA") and four of its members for injunctive and declaratory relief. 625 F.2d at 232. The plaintiffs alleged that certain regulations adopted by the CTRPA and actions taken by that body were unconstitutional, that they violated several provisions of the federal constitution: the Fifth and Fourteenth Amendments, the right to travel inherent in the Constitution, and the Supremacy Clause. *Id.* at 232-33.[6] The district court dismissed on the ground that federal courts should, as a matter of discretion, abstain from exercising jurisdiction in cases where the federal constitutional claims that support jurisdiction would be mooted or altered by a state court interpretation of state law. *Id.* at 232. The court did not reach the question of standing. *Id.*

The Ninth Circuit affirmed but, with regard to the City, did so on the ground of lack of standing. The court noted that "[i]t is well established that 'political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.' " *Id.* at 233 (quoting *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973)). "This is true whether the defendant is the state itself or another of the state's political subdivisions." *South Lake Tahoe*, 625 F.2d at 233. The court then held that the City of South Lake

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[6] The basis for the Supremacy Clause claim was that the CTRPA's actions conflicted with the plans and ordinances of a bi-state administrative body established by California and Nevada and approved by Congress. *Id.* at 233.

Tahoe, as a political subdivision of the State of California, lacked standing to challenge the CTRPA's plans and ordinances on constitutional grounds in federal court. *Id.*[7]

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[7] In *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, 91 F.3d 1240 (9th Cir. 1996) (*Indian Oasis I*), two Arizona public school districts and several of their students brought suit in federal court against the Arizona Superintendent of Public Instruction and the county treasurers and school superintendents of Prima and Navajo counties. *Id.* at 1241. The plaintiffs sought injunctive and declaratory relief holding that an Arizona educational funding statute violated a federal education funding law and, therefore, violated the Supremacy Clause of the federal constitution. *Id.* The district court dismissed as to all plaintiffs for lack of standing. *Id.*

On appeal, the Ninth Circuit initially affirmed on the merits the district court's ruling on the school district's standing. *Id.* at 1244. The appellate court indicated that it was bound [sic] do so by *South Lake Tahoe. Indian Oasis I*, 91 F.3d at 1244. Although it evidently was not convinced of the correctness of *South Lake Tahoe*, it nevertheless considered that case to be controlling authority. *Indian Oasis I*, 91 F.3d at 1243.

Subsequently, however, the Ninth Circuit granted rehearing of *Indian Oasis I* en banc. On rehearing, the court issued a new opinion holding that it lacked jurisdiction to hear the appeal, and dismissed the appeal. *Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk*, ___ F.3d ___, No. 93-16089, 1997 WL 131988, at *1, 97 Daily Journal D.A.R. 3913 (9th Cir. Mar. 25, 1997) (*Indian Oasis II*). The court did not address the standing issues on which the original panel had initially relied. Thus, it appears that the earlier Ninth Circuit opinion in *Indian Oasis I* is not, formally, binding law. However, that opinion is still persuasive that *South Lake Tahoe* continues to be valid, controlling law.

B. APPLICATION

The Authority seeks to avoid dismissal of this entire action on two general grounds. First, it argues that it has standing. Second, and in the alternative, it argues that even if it lacks standing, the Court should still retain and address Burbank's counterclaims.

1. The Authority's Standing

The Authority attempts to avoid the application of the *South Lake Tahoe* standing rule to it on two grounds: (1) neither itself nor Burbank is a "political subdivision" of the State of California; and (2) the rule does not bar a political entity from challenging the constitutionality of an ordinance enacted by a "charter city." (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 3-6.)

a. The Status of the Authority

In *South Lake Tahoe,* the Ninth Circuit held that an entity which it called a "city" was a "political subdivision" for the purposes of the rule which bars political subdivisions from raising constitutional challenges to state statutes or local ordinances in federal court. As noted above, that decision governs the case at bar.

The Authority, however, seeks to avoid the *South Lake Tahoe* standing rule by drawing a distinction between "non-charter" cities and "charter" cities. The Authority claims that "non-charter" cities are "political subdivisions" of the State, while "charter" cities are not. Therefore, it claims, "non-charter" cities are subject to the *South*

Lake Tahoe rule, while "charter" cities are not. Then, through a leap made without clear explanation and wholly without legal authority, the Authority reaches the conclusion that it stands in the position of a charter city and so is itself not subject to *South Lake Tahoe*.

Nothing in *South Lake Tahoe* supports the distinction the Authority attempts to draw. The Authority refers to the City of South Lake Tahoe as an example of a "non-charter city." However, as Burbank and the State Defendants point out, the *South Lake Tahoe* court, in holding that the plaintiff city lacked standing, did not refer to South Lake Tahoe as either a "charter" or "non-charter" city. Instead, the Ninth Circuit simply held that the city in that case lacked standing to sue. The Authority's argument, in other words, is groundless.

In another rather convoluted attempt to manufacture standing, the Authority also cites to two early California Supreme Court cases that address the status of various political entities in California. In *Los Angeles County v. Riley*, 6 Cal. 2d 625, 59 P.2d 139 (1936), the court was faced with a dispute between a county and the state over whether certain tax funds collected by the state and appropriated to the counties could be used only for "state purposes." Consequently, the court focused on the differences and overlap between the functions performed by states, counties, and cities. *Id.* at 628. The court drew a distinction between counties, which it identified as political subdivisions, and municipal corporations: "Counties are not municipal corporations, but are political subdivisions of the state for purposes of government." *Id.*

In *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 326 P.2d 484 (1958), retired city employees sought to recover the difference in pension payments between what they would have received under one payment scheme and what they actually received under a later-implemented payment scheme. The later scheme was put in place through amendments to the city charter. *Id.* at 446. The court held for the plaintiffs, concluding that the charter amendments were not applicable to the plaintiffs. *Id.* at 455. The court addressed the definition of "political subdivision" in connection with the issue of the interest on the unpaid balances due the plaintiffs. The relevant statute specifically permitted recovery of interest from "political subdivisions of the State" which were judgment debtors. *Id.* at 466. The court concluded that a municipal corporation, in contrast to a county, was not a "political subdivision of the State" for purposes of that interest statute, and denied plaintiffs the interest recovery. *Id.* at 467-68. In so concluding, the court cited an earlier California Supreme Court case which had declared that " '[a] county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government,' " *Id.* at 467 (quoting *County of San Mateo v. Coburn*, 130 Cal. 631, 636, 63 P. 78 (1900)).

However, these sources do not support the Authority's position in this case. The Authority does not exercise functions that can fairly be called "local," and so is not helped by *Abbott* and *Riley*. Those cases based the distinction between counties and municipal corporations, for

purposes of the statutes at issue in each case, in significant part on the local character of the functions performed by municipal corporations, in contrast to the way counties operate to implement state functions. *See Abbott*, 50 Cal. 2d at 467; *Riley*, 6 Cal. 2d at 627-28. The Authority, however, was created as a joint powers public agency pursuant to a state statute, Cal. Gov't Code § 6546.1 (West 1995) (providing for creation of a joint powers public agency to own and operate the Airport), and performs functions better characterized as "state," or even interstate, rather than "local." That characterization is further supported by the provision in the joint powers legislation that permits the "public agencies" to be formed through joint agreements entered into by California political entities with entities from outside of California. *See id.* § 6502 (West 1995).

In addition, as the State Defendants note, elsewhere in California law entities like Burbank and like the Authority itself are specifically included in the definition of "political subdivision." One example is the California State Aeronautics Act, which regulates certain aeronautics activities and is thus far closer in subject matter to the case at bar than the statutes at issue in *Riley* and *Abbott*. The Aeronautics Act defines "political subdivision" to mean "any county, city, city and county, public corporations, district or other political entity or public corporation of this State." Cal. Pub. Util. Code § 21010 (West 1994). Other provisions of the Act contemplate that the term includes entities like the Authority. *See, e.g., id.* § 21207 (West 1994) (referring to "political subdivision[s] owning and operating airport[s]").

In short, the Court finds that the Authority is a political subdivision for purposes of the standing rule set out in *South Lake Tahoe*, and so is subject to that rule.

b. Challenging a Charter City's Ordinance

The Authority also contends that the *South Lake Tahoe* rule "does not bar a political entity from challenging the constitutionality of an ordinance enacted by a charter city." (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 3.) Although the reasoning the Authority sets out is somewhat opaque, the Authority argues that the rule is predicated on the assumption that a "political subdivision" is a "creature of the state" and a subordinate political entity. *Id.* The Authority seems to argue that even if it lacks standing to bring a federal action against the State challenging a state statute on constitutional grounds, it nevertheless has standing to bring a federal action against an entity other than the State itself to challenge an ordinance passed by that entity. In other words, even if in this forum the Authority cannot challenge the Statute, it can still challenge the Review Procedures.

However, the Authority cites to no direct authority for this argument, but instead cobbles it together from various unrelated case law and statutory sources. As with the Authority's effort to distinguish charter cities from non-charter cities, here nothing in *South Lake Tahoe* suggests the distinction the Authority attempts to draw. Indeed, there the Ninth Circuit specifically stated that a political subdivision of a state may not challenge a state statute in federal court on constitutional grounds,

whether the defendant is the state itself or another political subdivision of the state. *South Lake Tahoe*, 625 F.2d at 233. The court then specifically held that the plaintiff city lacked standing to challenge the *"plans and ordinances"* of another political subdivision of the state on constitutional grounds in federal court. *Id.* (emphasis added). As discussed above, there is no basis for considering either the Authority or Burbank to be anything other than a political subdivision, at least for purposes of the *South Lake Tahoe* standing rule. There is also no basis for distinguishing the Review Procedures from the plans and ordinances at issue in *South Lake Tahoe*. Accordingly, this argument too must be rejected.

In sum, the Court finds that the Authority lacks standing to bring the instant action. The Court therefore DISMISSES the Authority's suit.

2. Jurisdiction over Burbank's Counterclaims

In the alternative to arguing that it has standing, the Authority argues that the Court has jurisdiction over, and should, proceed to the merits of, Burbank's counterclaims.

The Authority contends, without citation to legal authority, that a municipality, whether or not a political subdivision, can bring a suit in federal court to enforce, as opposed to, challenge, its own local ordinances and state statutes. (Authority's Mem. Opp. Def.s' Mots. Summ. J. at 5.) It follows, the Authority argues, that even if the Authority lacks standing to bring the underlying

action, the Court may still proceed to rule on Burbank's counterclaims. (*Id.* at 6.)

In the present case, Burbank has counterclaimed against the Authority seeking: (1) to enjoin the Authority from acquiring land within Burbank without the approval of the Burbank City Council, and to enjoin the Authority and Lockheed Martin from transferring the B-6 property without similar approval; and (2) declaratory judgments that the Authority must obtain the Burbank City Council's approval prior to acquiring an interest in land in Burbank, and that the Authority and the FAA are on notice of Burbank's objection to any expansion of the Airport within Burbank.

The State Defendants argue that the validity of Burbank's counterclaims, as counterclaims, does not give the Court jurisdiction over the Authority's underlying action. (State Def.s' Reply at 8.) The State Defendants, through their arguments against the Authority having standing, appear to concede that Burbank would be barred by *South Lake Tahoe* from bringing its counterclaims as an independent action in federal court. They are nevertheless valid *counterclaims,* the State Defendants contend, because a counterclaim does not require an independent basis of federal subject matter jurisdiction. *Id.* at 8-9 (citing Fed. R. Civ. P. 13(a)). Indeed, they maintain, here the counterclaims do *not* have an independent basis for jurisdiction. *Id.* at 9 ("Burbank's compulsory counterclaims, therefore, pose *no* federal question triggering the jurisdiction of this Court.") (emphasis in original). Instead, the Court's jurisdiction over the counterclaims is dependent upon the existence of jurisdiction over the Authority's underlying action. *Id.*

Rule 8 provides, in pertinent part, that "[a] pleading which sets forth a claim for relief, whether an original claim [or] counterclaim . . . shall contain . . . a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it." Fed. R. Civ. P. 8(a). A counterclaim need not have an independent basis for jurisdiction in order to be valid. Rule 13(a) provides, in pertinent part, that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). However, where the counterclaim does not have an independent federal jurisdictional basis and the underlying complaint is dismissed, the counterclaim must also be dismissed. *DHL Corp. v. Loomis Courier Serv., Inc.*, 522 F.2d 982, 985 (9th Cir. 1975) ("None of these counterclaims has an independent federal jurisdictional basis. They, therefore, cannot stand following dismissal of the complaint.") (footnote omitted).

In the case at bar, the Court has dismissed the underlying action for lack of jurisdiction due to the Authority's lack of standing. The Court also finds that Burbank's counterclaims do not raise a federal question, the only potential independent basis for federal jurisdiction over the counterclaims.[8] There is thus no independent basis

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[8] It is true that Burbank has moved for summary judgment that the Statute and the Review Procedures are not preempted by federal law and do not violate federal due process. The fact

for jurisdiction over the counterclaims. Therefore, the counterclaims must be, and hereby are, DISMISSED.

V. CONCLUSION

For the foregoing reasons, the Court concludes that the Authority lacks standing to sue, and DISMISSES this case, including Burbank's counterclaims, pursuant to rule 12(h) (3). Consequently, the Court finds that the remaining motions are MOOT.

IT IS SO ORDERED.

Dated: March 31, 1997

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States
District Judge

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of so moving, however, is not sufficient to establish jurisdiction over the counterclaims themselves. Burbank was seeking summary judgment on issues raised by the Authority in the Authority's pleadings, rather than on its own counterclaims. The plain language of Rule 8(a) makes clear that, in order for a court to have jurisdiction over a counterclaim separate from the underlying action, the counterclaim itself must assert an independent basis for jurisdiction. Burbank's counterclaims, however, do not do so.

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BURBANK-GLENDALE-PASADENA AIRPORT AUTHORITY, a joint powers agency, Plaintiff-Appellant, v. CITY OF BURBANK, a municipal corporation; JAMES W. VAN LOBEN SELS, in his official capacity as Director of the Department of transportation of the State of California, Defendants-Appellees, and STATE OF CALIFORNIA, Intervenor-Defendant-Appellee.	No. 97-55520 DC No. CV-96-04125-LGB (Central California) ORDER

(Filed Apr. 14, 1998)

Before: SCHROEDER and KOZINSKI, Circuit Judges, and WHYTE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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*Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.